No. 90-1558

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1991

DEVAUGHN E. WILLIAMS,

Petitioner,

v.

FIRST UNION NATIONAL BANK OF NORTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER AN EMPLOYER'S RACIALLY MOTIVATED DISCHARGE OF AN EMPLOYEE IS ACTIONABLE UNDER 42 U.S.C. SECTION 1981 ?

II. WHETHER DISCHARGE AND OTHER FORMS OF RETALIATION DURING EMPLOYMENT BY AN EMPLOYER AGAINST AN EMPLOYEE FOR FILING TITLE VII CHARGES AND MAKING OTHER PROTESTS AGAINST RACIAL DISCRIMINATION ARE ACTIONABLE UNDER 42 U.S.C. SECTION 1981 ?

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The opinion of the Court of Appeals, Williams v. First Union Nat'l Bank of N.C., No 90-2074 (4th Cir., December 6, 1990) (App. 1-11)is reported at 920 F.2d 232 (4th Cir. 1990). The Order of the District Court (Britt, J.) (App. 24-25) and the Memorandum and Recommendation of the Magistrate (Denson, J.-M.) (App. 12-22), which Judge Britt adopted, are unreported.

JURISDICTION

The opinion and judgment of the Court of Appeals was dated and entered on December 6, 1990. A timely Petition for Rehearing, with Suggestion for Rehearing In Banc, was denied by the Court of Appeals on January 8, 1991. This Court's jurisdiction to review the judgment of the Court of Appeals by writ of certiorari is conferred by 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

The federal statute involved is 42 U.S.C. 1981 (App. 21). Also relevant are the following provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq.: 42 U.S.C. Section 2000e-2(a)1 (App. 30); and 42 U.S.C. Section 2000e-3(a) (App. 30-31).

STATEMENT OF THE CASE

Petitioner DeVaughn E. Williams ("Williams") brought this action in the United States District Court for the Eastern District of North Carolina on June 14, 1989 (one day before the announcement of this Court's decision in Patterson v. McLean Credit Union) pursuant to 42 U.S.C. Section 1981, alleging, inter alia, that Respondent First Union National Bank of North Carolina ("First Union") fired him due to his race and in retaliation for filing EEOC charges. Williams sought reinstatement, back pay, general and punitive damages and injunctive and declaratory relief.

First Union moved to dismiss the Complaint pursuant to F.R.C.P. 12(b)(6) for failure to state a claim upon which relief can be granted, citing Patterson. Following an amendment to more specifically describe Williams' allegations, the District

Court dismissed the amended complaint for failure to state a claim upon which relief can be granted. The Court of Appeals affirmed.

Williams' allegations as stated in his amended complaint, and supporting affidavit, are as follows:

Williams, a black male, sought a city executive banking position with First Union. Though he was qualified, he was denied a city executive position on the pretext of a non-existent bank policy that no new employee could join the Bank as a city executive. Mr. Williams was told that instead he could only start as a "senior credit officer" in the Greensboro, N.C. branch office.

Williams' commercial banking manager, Randall Phillips, indicated that the Charlotte bank headquarters was pressing the Greensboro branch to hire him as a "token" black manager, which the Greensboro branch opposed. Phillips stated that the Greensboro office had warned the Charlotte office that Williams was being set up to fail, meaning that as a black credit manager he could not be successful in Greensboro.

Phillips' description of Williams' true situation at Greensboro proved accurate. Plaintiff was bypassed and

ignored by white account officers, who looked for ways to circumvent his credit approval responsibility. Williams had virtually no real authority. He repeatedly complained about this state of affairs to his supervisors.

Finally, when Williams' complaints about his treatment had been ignored too long, he filed an EEOC charge.

In retaliation, and because of his race, Williams was given adverse reviews, was isolated from his co-workers and was discharged.

These actions, as set out in the amended complaint, were willfully, wantonly and intentionally implemented to deny Williams the benefits of employment commensurate with that of white employees and on account of his race and color, to impede his access to the courts and to prevent and deter him from bringing suit and giving evidence against First Union, and in retaliation for having filed EEOC charges alleging race discrimination and retaliation.

REASONS FOR GRANTING THE PETITION

I. THE COURTS OF APPEALS ARE IN CONFLICT AS TO WHETHER SECTION 1981 PROHIBITS A RACIALLY MOTIVATED OR RETALIATORY DISCHARGE.

One of the most important considerations governing this Court's review on writ of certiorari is the existence of a conflict among the circuits. Rule 10.1(a), Supreme Court Rules. Prior to this Court's 1989 decision in Patterson v. McLean Credit Union, claims for racial or retaliatory discharge were considered by virtually all courts and commentators to be within the scope of 42 U.S.C. Section 1981. Perritt, Employee Dismissal Law and Practice (2d Ed. 1987) sec 2.8 at 61; Player, Employment Discrimination Law (1988) sec. 8.02 at 615. Now, following Patterson, the courts of appeals have divided over the scope of section 1981. The Fourth Circuit in this case held that, as a result of the analysis presented in Patterson, 42 U.S.C. Section 1981 no longer provides a cause of action to redress racially motivated discharges and does not provide a cause of action for retaliation (except perhaps where the retaliation actually prevents or precludes the filing of EEOC charges or the filing of a lawsuit). This decision is squarely in

conflict with the decision by the Eighth Circuit in Hicks v. Brown Group, Inc., 902 F.2d 630 (8th Cir. 1990), which held, after an exhaustive analysis of the case law and legislative history, that both discharge and retaliation claims remain colorable under section 1981 even after Patterson.

In addition, the Second, Fifth, Seventh and Ninth Circuits have addressed the issue of whether pure racial discharge claims under Section 1981 survive Patterson and have decided that they do not. Gonzalez v. Home Insurance Company, 909 F.2d 716 (2d Cir. 1990); Lavender v. V&B Transmissions and Auto Repair, 897 F.2d 805 (5th Cir. 1990); McKnight v. General Motors Corporation, 908 F.2d 104 (7th Cir. 1990); Courtney v. Canyon Television and Appliance Rental, Inc., 899 F.2d 845 (9th Cir. 1990).

On the related issue of whether retaliation claims under Section 1981 survive Patterson the lower courts appear divided as well. In addition to the decision by the Fourth Circuit in this case, and those in Hicks and McKnight, supra, see Rathjen v. Litchfield, 878 F.2d 836 (5th Cir. 1989) (retaliation claims do not survive); Malhotra v. Cotter & Co., 885 F.2d 1305 (7th Cir. 1989) (dictum that retaliation claims survive; Cudahy, J.

concurring); Jackson v. City of Albuquerque, 890 F.2d 225, 226 n. 15 (10th Cir. 1989) (footnote stating without discussion that Plaintiff's claims, including retaliation under Section 1981, were unaffected by Patterson); Sherman v. Burke Contracting, 891 F.2d 1527 (11th Cir. 1990) (apparently allowing retaliation claims only where EEOC charge was filed to assert contract right).

This Court has indicated that it has reserved decision on whether discharge and retaliation claims survive Patterson. See Jett v. Dallas Independent School District, 491 U.S. ____, 109 S.Ct. 2702, 2710, 105 L.Ed.2d 598 (1989) ("assuming... without deciding" that discharge claims survive); Lytle v. Household Manufacturing, Inc., 110 S.Ct. 1331, 1336 n.3, 108 L.Ed.2d 504 (1990) (Fourth Circuit on remand to consider the "open issue" of impact of Patterson on dismissal and retaliation claims).

Petitioner submits therefore that review of his questions presented is warranted due to the need to resolve a clear conflict between the circuit courts on the "open issue" of whether he has stated a claim for relief under this most vital statute.

II. PATTERSON v. MCLEAN CREDIT UNION IS BEING MISAPPLIED BY THE MAJORITY OF THE COURTS OF APPEALS SO AS TO VITIATE THE FORCE OF 42 U.S.C. SECTION 1981 AND SIGNAL A RETREAT FROM THE CONGRESSIONAL POLICY TO FORBID RACIAL DISCRIMINATION IN THE PRIVATE SECTOR.

This is a case alleging wilfull racial discrimination in employment implemented via discharge and retaliation. Assuming Williams' allegations to be true, at the time it fired Williams, First Union was indisputably in violation of 42 U.S.C. Section 1981, under the interpretation of that statute consistently and unanimously followed by this Court and all of the courts of appeals, for having committed a racially motivated discharge. Johnson v. Railway Express Agency, 421 U.S. 454, 459-60 (1975) (black employee can sue former employer, inter alia, for discharge on the basis of race); MacDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 275 (1976) (white workers can sue employer for racial discharge); St. Frances

College v. Al-Khazraji, 481 U.S. 604, 606 (1987) (Arab professor can sue for being denied tenure and forced from job); Goodman v. Lukens Steel Co., 482 U.S. 656, 659-60 (1987) (limitations period under 1981 applies to discharges); Rowlett v. Annheuser-Busch, Inc., 832 F.2d 194 (1st Cir. 1987); Ramseur v. Chase Manhattan Bank, 865 F.2d 460 (2d Cir. 1989); Kelley v. TKY Refractories Co., 860 F.2d 1188 (3d Cir. 1988); Gairola v. Commonwealth of Virginia Dept of Gen'l Svcs., 753 F.2d 1281 (4th Cir. 1985); Comeaux v. Uniroyal Chemical Corp., 849 F.2d 191 (5th Cir. 1988); Black v. Akron, 831 F.2d 131 (6th Cir. 1987); Yarbrough v. Tower Oldsmobile, Inc., 789 F.2d 508 (7th Cir. 1986); Edwards v. Jewish Hosp. of St. Louis, 855 F.2d 1345 (8th Cir. 1988); Sengupta v. Morrison-Knudsen Co., Inc., 804 F.2d 1072 (9th Cir. 1986); Meade v. Merchants Fast Motorline, Inc., 820 F.2d 1124 (10th Cir. 1987); Vance v. Southern Bell Tel. and Tel. Co., 863 F.2d 1503 (11th Cir. 1989).

Williams submits that it is clear that section 1981 covers terminations of employment contracts from the language of the statute itself. This is most easily seen when the following question is considered: how can a black employee be said to

have "the same right to make" a contract or have the same "benefit" of the laws allowing him the power to contract as a white person, when his contract is terminable due to his race ?

The Court's opinion in the case of Patterson v. McLean Credit Union, 491 U.S. , 105 L.Ed.2d 132, 109 S.Ct. 2363 (1989), nowhere discusses this concept, and indeed nowhere mentions the word "discharge". This is very significant. After all, the first portion of Patterson was devoted to a careful stare decisis analysis of the prior interpretation of section 1981 in Runyon v. McRary, 427 U.S. 160 (1976). After expressly discussing whether or not to overrule Runyon at such length, and deciding not to, it is simply unthinkable that this Court would have then gone on to silently overturn the entire line of cases cited above. As the Eighth Circuit expressed it in Hicks v. Brown Group, 902 F.2d 630, 638 (8th Cir. 1990):

> We believe that if the Supreme Court intended to call into question or overrule this substantial body of employment discrimination precedent in Patterson, it would have said so. We do not believe that the Supreme Court would

reject by implication such seminal Section 1981 cases without so much as even a word.

Moreover, as the Hicks court observed, because the Patterson majority plainly had the discharge question called to its attention by Justice Brennan, its silence on this issue is doubly significant:

> We also find it significant that the majority took issue with substantial portions of Justice Brennan's opinion dissenting in part, see Patterson, 109 S.Ct. at 2371 n.1, 2376-77, but did not object to his statement that Section 1981 continues to provide a cause of action for discriminatory discharge. See Id. at 2388 (in enacting Section 1981, Congress intended "to go beyond protecting the freedmen from refusals to contract for their labor and from discriminatory decisions to discharge them") (emphasis added) (Brennan, J., concurring in the judgment in part and dissenting in part). We also note that one of the most common uses of Section 1981 is in discriminatory discharge actions. See generally

> Eisenberg & Schwab, The Importance of Section 1981, 73 Cornell L. Rev. 596, 599-601 (1988) (analyzing number of Section 1981 employment discrimination claims filed in three federal district courts in fiscal year 1980-81). In light of the large number of Section 1981 discharge claims brought in the federal courts, we believe the Supreme Court would have at least expressed doubt about the continuing viability of such causes of action after Patterson.

Id. at p. 638.

Williams' retaliation claim, as well, was clearly valid at the time of his discharge by First Union. Prior to Patterson, it was widely held that section 1981 gives rise to a cause of action for retaliation. There are two main lines of cases. The first line derives from Sullivan v. Little Hunting Park, 396 U.S. 229, 24 L.Ed.2d 386, 90 S.Ct. 400 (1969), a case brought under both section 1981 and 1982. There, plaintiff Sullivan was a member of a non-stock company organized to allow its homeowning members to use a common park and recreational facilities. When he tried to sell his interest to a black person,

he was refused permission. When he protested this refusal, he was himself expelled. This Court held that Sullivan had a cause of action under 42 U.S.C. Section 1982 to redress that retaliation. The logic of Sullivan was followed by later courts which held that a cause of action arises under section 1981 in favor of a person who challenges racial discrimination against another, and as a consequence himself suffers retaliation. See Winston v. Lear-Siegler, Inc., 558 F.2d 1266 (6th Cir 1977); Pinkard v. Pullman-Standard, 678 F.2d 1211 (5th Cir. 1982), cert. den. 459 U.S. 1105, 103 S.Ct. 729, 74 L.Ed.2d 954 (1983); DeMatteis v. Eastman Kodak Co., 511 F.2d 306 (2nd Cir. 1975); Price v. Federal Express Corp., 660 F.Supp. 1388 (D. Colo. 1987); Perry v. Manocherian, 675 F.Supp 1417 (S.D.N.Y. 1987); Ragheb v. Blue Cross and Blue Shield of Mich., 467 F.Supp. 94 (E.D. Mich 1979); and Liotta v. National Forge Co., 473 F.Supp. 1139 (W.D. Pa. 1979), aff'd in part 629 F.2d 903 (3d Cir. 1980), cert. den. 451 U.S. 970, 101 S.Ct. 2045, 68 L.Ed.2d 348 (1981).

The second line of cases, exemplified by Skinner v. Total Petroleum, Inc., 859 F.2d 1439 (10th Cir. 1988); Setser v. Novack Inv. Co., 638 F.2d 1137 (8th Cir. 1981); Goff v.

Continental Oil Co., 678 F.2d 593 (5th Cir. 1982); Sisco v. Alberici Construction Co., 655 F.2d 146 (8th Cir. 1981); London v. Coopers and Lybrand, 644 F.2d 811 (9th Cir. 1981); Crawford v. Roadway Express, Inc., 485 F.Supp. 914 (W.D. La. 1980); Garcia v. Rush Presbyterian Medical Center, 80 F.R.D. 254 (N.D. Ill. 1978); Evans v. Chesapeake and Potomac Telephone Company of Maryland, 518 F.Supp. 1074 (D. Md. 1985); and Robinson v. Vitro Corp., 620 F.Supp. 1066 (D. Md. 1985), holds that a cause of action arises under section 1981 when a person suffers retaliation for complaining of racial bias against himself.

Patterson itself plainly countenances retaliation cases under section 1981, as is noted by Judge Cudahy in his concurrence in Malhotra v. Cotter & Co., 835 F.2d 1305, 1314 n.1:

> [T]o the limited extent Patterson is relevant here, it would appear to support the recognition of a cause of action for retaliatory conduct. The Patterson court explained that Section 1981's guarantee of the right "to enforce contracts"

'covers wholly private efforts to impede access or obstruct non-judicial methods of adjudicating disputes about the force of binding obligations...' (emphasis in original).

The cause of action for retaliation in section 1981 is supported as well by other language in the statute. 42 U.S.C. Section 1981 confers equal rights not only to "make and enforce contracts", which was the focus of the Supreme Court's analysis in Patterson, but also to "sue, be parties, [and] give evidence ...". This language is itself a sufficient underpinning, Williams submits, for a claim of retaliation brought under 1981 to redress efforts by an employer to impede an employee's section 1981 or Title VII claims of racial discrimination. In Littleton v. Berbling, 468 F.2d 389 (7th Cir. 1972), rev'd on other grounds, 414 U.S. 488 (1974), county officials deprived blacks of the right to give evidence against whites who threatened their safety and property, which was held to state a claim under Section 1981. In Pennsylvania v. Local 542, Int'l Union of Operator Engineers, 347 F.Supp 268 (E.D. Pa. 1972), aff'd 478 F.2d 1398 (3rd Cir. 1973), plaintiffs' claims of a conspiracy to harass, intimidate and injure them in order to deter a lawsuit were found actionable under Section 1981.

Williams alleges here that the purpose and impact of the retaliation against him was to adversely affect his ability to use the EEOC and the courts to challenge his discriminatory contract with First Union. He complained that because of his race he was not allowed to do his job as a senior credit officer, as his first EEOC charge reflects on its face. (Is not the right to do one's assigned job a contract right ?) Specifically, Williams notes that he was effectively cut off from information and ordinary communication within the office, and his performance and workload were so stifled that he was in effect precluded from developing evidence of his work effectiveness to contradict charges that his poor performance was the reason for his adverse treatment. Moreover, when the retaliation took the form of the loss of his job, Williams had to devote time and energy and money towards resettling himself, and did not have the financial ability to pursue a Title VII action or a suit based on Section 1981 at that time. Indeed, First Union told Williams he would also be denied any severance pay.

Such deliberate actions, of course, had the natural effect of adversely impacting Williams' right to "make" and "enforce"

his contract, as well as his right to "sue, be a party, [and to] give evidence."

The court of appeals in this case held that, although the Patterson decision expressly recognizes that Section 1981 "also covers wholly private efforts to impede access to the courts", which phrase would seem plainly to cover the efforts to impede a Title VII or section 1981 suit which occurred here, Section 1981 does not apply because Williams succeeded in filing his EEOC charges and this suit. This reasoning is faulty.

Taken literally, the reasoning of the court of appeals would allow an employer immunity for literally any conduct designed to "impede access to the courts", so long as the employee eventually drags himself the witness stand.

This is not what this Court intended in Patterson. As noted earlier, this Court stated that 1981 "covers wholly private efforts to impede" access (emphasis added). It is not necessary, therefore, that the effort succeed in its purpose of stopping a plaintiff from reaching court for liability to attach under Section 1981.

Lastly, and most importantly, a cause of action for retaliation must survive Patterson simply because of the need to

preserve the integrity of the statutory enforcement process. That need did not disappear on June 15, 1989.

Williams submits that the dismissal of his discharge and retaliation claims by the district court and the affirmance of that dismissal by the court of appeals below represents a misapplication of Patterson. It is true that the court of appeals followed the interpretation of Patterson by the majority of the other circuits. But as is shown here, those cases are wrongly decided, in a way which signals a massive retreat from the congressional intent to forbid discrimination in the private sector.

That such was Congress' intent is not subject to doubt. For brevity's sake, the legislative history of section 1981, which is exhaustively treated by the opinion in Hicks at pp. 642- 648, will not be repeated here, but Williams urges that this Court consider it carefully. As Hicks notes, legislative history has routinely been used as a guide by the Supreme Court in interpreting Section 1981, both before and after Patterson. See Hicks at p. 642-643 n.31 (collecting cases). The bottom line of the Hicks decision's review of the legislative history is clear:

This review of the context of the debate, the evidence before Congress, and the debates themselves is instructive in two key respects. First, the replacement of slavery with the free labor contract system was a cornerstone of northern reconstruction policy. The free contract system was seen as essential to the radical reordering of southern society. Secondly, Congress was quite conscious of the multitude of devices used to deny the freedmen the meaningful exercise of their rights, including their rights to make and enforce contracts. Congress therefore passed an intentionally broad act, in order to insure the former slaves the meaningful exercise of their rights in the face of manifold southern resistance.

Given Congress' acquaintance with and concern about the varied forms of southern intransigence, we doubt that it would have subscribed to an interpretation of Section 1981 that secures the equal right of the freedmen to make contracts at the formation stage, but then abandons them after the contract is formed. Congress could not have been

so naive as to believe that nothing more needed to be done other than to secure the right to enter into contracts. We do not believe that Congress would have countenanced an interpretation of the 1866 Act which made it susceptible to such easy subversion. This could not have been the intended fate of the 1866 Act, which was designed to secure "freedom in fact." Cong. Globe, 39th Cong., 1st Sess. 476 (remarks of Senator Trumbull). Because of the importance of the free labor contract to the envisioned transformation of the South and the evidence of resistance to its implementation that Congress considered, we believe that Congress could have only intended that the 1866 Act be interpreted to secure the meaningful exercise of the rights to make and enforce contracts. The historical context, evidence before Congress, and legislative history of the 1866 Act thus buttress our conclusion that the right to make a contract forbids discriminatory discharge. Id. at p. 648.

The retreat from this congressional purpose to secure the "meaningful" exercise of contract rights now implemented in the majority of the courts of appeals removes the right to a jury trial and compensatory and punitive damages from the

battlefield on which victims of racial discrimination seek redress. Moreover, as a practical matter, retaliation no longer is redressable under section 1981 for such victims, under the "heads the employer wins, tails the employee loses" analysis followed by the court of appeals in this case. An employee who never sues for retaliation by definition never gets redress. On the other hand, an employee who does sue for retaliation loses as well because by suing he shows that he was not prevented from pursuing his rights.

If this retreat is not reversed, victims of intentional racial discrimination in the workplace who fall outside Title VII's protection -- as many do who work for small employers or who have been transformed from employees into "independent contractors" on the advice of management consultants -- are without remedy. Review is therefore warranted to correct misapplication of this Court's decision in Patterson.

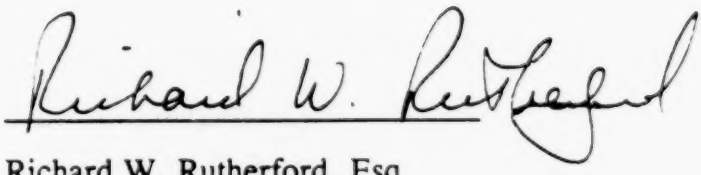
CONCLUSION

This Court should grant review on a writ of certiorari to the court of appeals to resolve the conflict between the courts of appeals as to whether racial discharge and retaliation remain

colorable causes of action under section 1981, and to correct the misapplication of this Court's decision in Patterson v. McLean Credit Union.

Respectfully submitted,

this the 4 day of April, 1991,

by 

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App. 1

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 90-2074

DEVAUGHN E. WILLIAMS,

Plaintiff-Appellant,

versus

FIRST UNION NATIONAL BANK OF N.C.,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. W. Earl Britt, District Judge. (CA-89-442-5-CIV).

Argued: October 31, 1990 Decided: December 6, 1990

Before WIDENER and CHAPMAN, Circuit Judges, and HADEN, Chief United States District Judge for the Southern District of West Virginia, sitting by designation.

Affirmed by published opinion. Judge Chapman wrote the opinion, in which Judge Widener and Chief Judge Haden joined.

ARGUED: Richard Woodson Rutherford, ANDERSON, RUTHERFORD & GEIL, Raleigh, North Carolina, for Appellant. Paul R. Beshears, SMITH, CURRIE &

HANCOCK, Atlanta, Georgia, for Appellee. ON BRIEF: J. Thomas Kirkpatrick, SMITH, CURRIE & HANCOCK, Atlanta, Georgia; James G. Billings, SMITH, ANDERSON, BLOUNT, DORSETT, MITCHELL & JERNIGAN, Raleigh, North Carolina, for Appellee.

CHAPMAN, Circuit Judge:

Plaintiff DeVaughn Williams ("Williams"), a black male, brought this action against defendant First Union National Bank ("First Union") alleging that he was subjected to discriminatory working conditions and was eventually constructively discharged because of his race and in retaliation for his having filed charges of discrimination against First Union with the Equal Employment Opportunity Commission ("EEOC").

In response to First Union's Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, Williams filed an amended complaint. The amended complaint, brought pursuant to 42 U.S.C. Section 1981, alleged that First Union violated section 1981 by: (1) refusing to enter into a nondiscriminatory employment relationship with

him; (2) subjecting him to discriminatory conditions of employment because of his race and in retaliation for filing charges of discrimination with the EEOC; and (3) constructively discharging him because of his race and in retaliation for filing charges of discrimination.

First Union again moved to dismiss pursuant to Rule 12(b)(6), and the motion was referred to Magistrate Alexander B. Denson who recommended the amended complaint be dismissed. Magistrate Denson found: (1) that Williams' discriminatory hiring claim was barred by the applicable statute of limitations; (2) that, after Patterson v. McLean Credit Union, ___ U.S. ___, 109 S. Ct. 2363 (1989), Williams' claim of discriminatory working conditions failed to state a claim under section 1981; and (3) that, after Patterson, Williams' claim of constructive discharge based on racial discrimination and retaliation failed to state a claim under section 1981. The district court adopted the magistrate's recommendation and dismissed the amended complaint and entered judgment in favor of First Union on March 29, 1990.

This case presents three issues on appeal: (1) whether the district court erred in ruling that a claim of discriminatory

discharge does not implicate the "make and enforce contracts" provision of 42 U.S. C. Section 1981; (2) whether Williams' claim that he was subjected to discriminatory working conditions in retaliation for filing EEOC charges is actionable under section 1981; and (3) whether the district court erred in applying Patterson retroactively to this case. After considering the record in this case and the applicable law, we find that the district court properly granted First Union's motion to dismiss for failure to state a claim upon which relief can be granted.

I.

In Patterson v. McLean Credit Union, ___ U.S. ___, 109 S. Ct. 2363 (1989), the Supreme Court considered the application of section 1981 to claims of discrimination in the employment context. The Court observed that:

> The most obvious feature of [section 1981] is the restriction of its scope to forbidding discrimination in the "mak[ing] and enforce[ment]" of contracts alone. Where an alleged act of discrimination does not involve the impairment of one of these specific rights, Section 1981 provides no relief. Section 1981 cannot be

> construed in all aspects of contract relations, for it expressly prohibits discrimination only in the making and enforcement of contracts.

Id. at 2372. The Court made it clear that the crucial determination under section 1981 is "whether the employer, at the time of the formation of the contract, in fact intentionally refused to enter into a contract with the employee on racially neutral terms." Id. at 2376-77 (emphasis added).

Williams maintains that the district court erred in finding that his claim of discriminatory discharge was not actionable under the "right to make contracts" provision of 42 U.S.C. Section 1981. However, the plain language of the Supreme Court in Patterson rejects any claim based on actions which occur after the contract has been formed. Patterson clearly held that section 1981's right to make contracts provision governs only conduct prior to the formation of the contract; it "does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, including breach of the terms of the contract . . . ." Id. at 2373. Since Patterson, a number of

courts of appeals have considered whether a claim of discriminatory discharge is actionable under section 1981. A majority of these courts have held that discriminatory discharge claims are not actionable under section 1981 based on the plain language of the Supreme Court in Patterson. See, e.g., Gonzalez v. Home Ins. Co., 909 F.2d 716, 722 (2d Cir. 1990); McKnight v. General Motors Corp., 908 F.2d 104, 108 (7th Cir. 1990); Walker v. South Cent. Bell Tel. Co., 904 F.2d 275, 276-77 (5th Cir. 1990); Courtney v. Canyon Television & Appliance Rental, 899 F.2d 845, 849 (9th Cir. 1990); Lavender v. V & B Transmissions & Auto Repair, 897 F.2d 805, 807-08 (5th Cir 1990). Cf. Hicks v. Brown Group, Inc., 902 F.2d 630, 635-38 (8th Cir. 1990) (discriminatory discharge completely deprives employee of employment and is therefor actionable under section 1981). We find the reasoning of the majority of these courts persuasive, and therefore we hold that discriminatory discharge claims are not actionable under 42 U.S.C. Section 1981. The district court did not err in granting First Union's motion to dismiss this claim for failure to state a claim upon which relief can be granted.

II.

We must also decide whether Williams' claim that he was subjected to discriminatory working conditions in retaliation for filing EEOC charges is actionable under section 1981. Williams asserts that the alleged retaliation was in response to his efforts to enforce his contract rights by filing EEOC charges; therefore, his claim is actionable under section 1981's protection of the right to "make and enforce" a contract. We find no merit in this argument.

In discussing section 1981's "make and enforce" contracts provision, the Supreme Court in Patterson held:

> It [section 1981] also covers wholly private efforts to impede access to the courts or obstruct nonjudicial methods of adjudicating disputes about the force of binding obligations . . . . The right to enforce contracts does not, however, extend beyond conduct by an employer which impairs an employee's ability to enforce through legal process his or her established contract rights.

Patterson, 109 S. Ct. at 2373. In this case, First Union's alleged retaliatory conduct did not prevent Williams from filing or pursuing EEOC charges and in no way impeded or obstructed Williams' access to legal process. The Ninth Circuit considered a nearly identical claim in Overby v. Chevron U.S.A., Inc., 884 F.2d 470 (9th Cir. 1989), and held that Chevron's alleged discharge of Overby in retaliation for filing EEOC charges did not "'impede' or 'obstruct' Overby's right to enforce his contract in violation of Section 1981 . . . ." Id. at 473. The Overby court also noted that the alleged retaliatory discharge in that case was expressly prohibited by section 704(a) of Title VII of the Civil Rights Act of 1964 and that Patterson had specifically "counseled against stretching the meaning of Section 1981 to protect conduct already covered by Title VII." Id. The Supreme Court in Patterson also cautioned against reading section 1981 so broadly that it "would undermine the detailed and well-crafted procedures for conciliation and resolution of Title VII claims." Patterson, 109 S. Ct. at 2374. Section 1981 was not enacted to duplicate the protection offered by federal anti-discrimination legislation. It was aimed instead at protecting a much narrower scope of

activity -- the right to make and enforce contracts. In this case, Williams seeks to extend section 1981 beyond its appropriate scope. Accordingly, we find that the district court did not err in ruling that Williams' claim that he was subjected to discriminatory working conditions in retaliation for filing EEOC charges is not actionable under section 1981.

III.

As a general rule, this court must apply retroactively any relevant interpretation of section 1981 by the Supreme Court. See Goodman v. Lukens Steel Co., 482 U.S. 656, 662 (1987); Solem v. Stumes, 465 U.S. 638, 642 (1984). The courts of appeals have not deviated from this general rule with regard to retroactive application of Patterson. See, e.g., Courtney v. Canyon Television & Appliance Rental, 899 F.2d at 849; Sherman v. Burke Contracting, Inc., 891 F.2d 1527, 1534-35 (11th Cir. 1990). Nevertheless, Williams argues that retroactive application of Patterson is inequitable in this case because he did not pursue his claims under Title VII and is now barred from doing so. The Fifth Circuit confronted the same issue in Lavender v. V & B Transmissions & Auto Repair, 897 F.2d 805 (5th Cir. 1990), where plaintiffs contended it would

be inequitable to apply Patterson retroactively to their section 1981 claims because they were precluded from pursuing a Title VII claim by the limitations period. That court rejected plaintiffs' argument noting that any unjust result suffered by plaintiffs stemmed from their failure to pursue a Title VII claim within the limitations period. Id. at 8097. We find this reasoning persuasive given the facts in this case. Accordingly, we find that the district court's retroactive application of Patterson was appropriate in this case.

For these reasons, the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NORTH CAROLINA

RALEIGH DIVISION

DEVAUGHN E. WILLIAMS,	)
Plaintiff,	)NO.89-442-CIV-5-BR
	)
v.	)MEMORANDUM AND
	)RECOMMENDATION
FIRST UNION NATIONAL	)
BANK OF NORTH CAROLINA,	)
Defendant.	)

This action, alleging racial discrimination in employment, is brought pursuant to 42 U.S.C. section 1981.[1] It is now before the undersigned on defendant's Motion to Dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6), which requires analysis of the complaint.

It is necessary to summarize the allegations of the complaint, all of which will be taken as true, for the purposes of this motion. Jenkins v. McKeithen, 395 U.S. 411 (1969).

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1 Plaintiff could not bring a Title VII claim because the statute of limitations had run at the time he filed this complaint.

In August, 1984 the plaintiff, a black male, was hired to work as a Senior Credit Officer in defendant's bank office in Greensboro, North Carolina. On May 8, 1986 the plaintiff filed a complaint with the Equal Employment Opportunity Commission (EEOC), alleging racial discrimination. Thereafter, on June 25, 1986 and again on September 15, 1986, the plaintiff was given adverse employment reviews by supervisors because of his race and also in retaliation for his EEOC filing. On September 22, 1986 plaintiff filed another EEOC complaint relating to these actions. Finally, on November 12, 1986, plaintiff was constructively discharged because of his race and in retaliation for his EEOC filings. He seeks injunctive relief and damages, including reinstatement and back pay, punitive damages, attorneys fees and litigation costs.

Plaintiff was allowed to amend his Complaint in which he alleged that the defendant intended to racially discriminate against him even from the outset when he was hired.

The thrust of the defendant's Motion to Dismiss is that this action is barred by the Supreme Court's ruling in Patterson v. McLean Credit Union, _____ U.S. ____, 109 S. Ct. 2362

(June 15, 1989), which defined the scope of 42 U.S.C. section 1981.

PLAINTIFF'S DISCRIMINATORY HIRING CLAIM

Initially, plaintiff desired a position with the defendant as a City Executive. The defendant's representative stated that a policy existed prohibiting hiring new people for these positions. Later, plaintiff learned that, in fact, defendant hired white employees for the City Executive positions.

Throughout its history section 1981 entertained claims of defendants entering into contracts with plaintiffs on discriminatory terms. These types of claims, such as in this case, remain viable despite the Patterson holdings. Patterson, 109 S. Ct. at 2373; See Johnson v. Jos. Schlitz Brewing Company, No. 84-1270 (4th Cir. 1985); Love v. Alamance County Board of Education, No. 84-1326 (4th Cir. 1985); Abasiekong v. City of Shelby and Wilkinson, No. 83-1598 (4th Cir. 1984); Lilly et. al. v. Harris Teeter Supermarket, No. 82-1831 (4th Cir. 1983).

In any event, the defendant argues that, in this instance, the statute of limitations bars the plaintiff's cause of action. "Because Section 1981, like Section 1982 and 1983, does not

contain a statute of limitations, federal courts should select the most appropriate or analogous state statute of limitations." Goodman v. Lukens, 482 U.S. 656 (1987).[2] In Goodman, the Court found that section 1981's bar on racial discriminaion protects a fundamental injury to the individual rights of a person. Thus, the Supreme Court held that the state statute of limitations period which governs personal injury actions should be borrowed and applied to section 1981 actions.

The limitations period for personal injuries in North Carolina is three-years. Thus, the statute of limitations allowed the plaintiff three years in which to bring his suit, beginning with the date the defendant hired the plaintiff on discriminatory terms. See Mack v. Great Atlantic and Pacific Tea Company, Inc., 781 F.2d 179 (1st Cir. 1989) (the limitations period ordinarily begins to run upon the commission of a discriminatory act).

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2 Prior to the Goodman decision, the most applicable statute of limitations period was North Carolina General Statute section 1-52(2) which governed claims for economic injuries. This section of the statute provides for a three-year limitation period. Kornegay v. Burlington Industry, Inc., 803 F.2d 787 (4th Cir. 1986). Thus, although the holding in Goodman had the effect of changing which section of North Carolina's limitations statute applied to section 1981 actions, it did not change the time period.

The plaintiff was considered for employment and actually began employment with the defendant in August, 1974. He did not file his original complaint in this action until June 14, 1989. Thus, the three-year statute of limitations had expired for the plaintiff's claim of discriminatory hiring by the defendant.

PLAINTIFF'S CLAIM FOR DISCRIMINATORY HARASSMENT

At the time the discriminatory acts occurred in the case at bar, the Fourth Circuit allowed claims for discriminatory discharge, failure to promote, and failure to hire to be brought under section 1981. However, claims for racial harassment were governed by Title VII of the Civil Rights Act of 1964. The Fourth Circuit Court of Appeals confirmed this rule in Patterson v. McLean, 805 F.2d 1143, 1145 (4th Cir. 1986).

Consequently, plaintiff's harassment claim should be dismissed for failure to state a claim under section 1981 upon which relief can be given.

PLAINTIFF'S DISCRIMINATORY DISCHARGE CLAIM

At the time of the discriminatory acts occurred in the case at bar, the Fourth Circuit, as mentioned, allowed claims

for discriminatory discharge, failure to promote, and failure to hire to be brought under section 1981. See Johnson v. Jos. Schlitz Brewing Company, supra; Love v. Alamance County Board of Education, supra; Abasiekong v. City of Shelby and Wilkinson, supra; and Lilly et. at. v. Harris Teeter Supermarket, supra.

In Patterson, the Fourth Circuit Court of Appeals held that "claims of racially discriminatory hiring, firing, and promotion go to the very existence and nature of the employment contract and thus fall easily within Section 1981's protection." Patterson v. McLean Credit Union, 805 F.2d 1143, 1145 (4th Cir. 1986). The Supreme Court disagreed stating that "[w]e think that somewhat overstates the case." Patterson, 109 S. Ct. at 2377.

The Supreme Court stated that section 1981 protects only two rights: (a) the right to make a contract and (b) the right to enforce the contract. Patterson v. McLean Credit Union, ___ U.S. ___, 109 S. Ct. 2363, 2372 (1989).3

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3 The pleadings indicate that no real controversy exists as to whether the defendant impeded the plaintiff's efforts to enforce the contract.

Plaintiff states that the retaliatory discharge due to his filing of the EEOC claims and the fact that he got no severance

"Section 1981 cannot be construed as a general proscription of racial discrimination in all aspects of contract relations, for it expressly prohibits discrimination only in the making and enforcement of contracts." Id. at 2372.

The Court stated that the crucial determination under section 1981 "remains whether the employer, at the time of the formation of the contract, in fact intentionally neutral terms. Id. at 2376-77 (emphasis added). Allegations of discriminatory conduct that occurred after formation of the contract are not covered by section 1981.

On remand, the Fourth Circuit held that based on the district court decision, their earlier opinion, and the Supreme Court ruling, neither of Patterson's claims or racial harassment or discriminatory discharge were actionable under section 1981. Patterson v. McLean Credit Union, 1989 U.S. App. LEXIS 15682 (4th Cir. October 16, 1989) (per curiam).

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pay impeded his ability -- financially and by reducing his access to information -- to enforce the contract.

Yet, the fact remains, he filed two separate EEOC claims and brought a federal court action. This is not evidence of actual impediments to his efforts to secure redress for the alleged wrongs done him. See Patterson, 109 S.Ct. at 2373.

The plain language which the Supreme Court used disallows any claims based on actions which occur after the contracts are formed. A majority of the courts which have considered the issue since the Supreme Court's ruling have held that discharge claims are not actionable under section 1981 based on the plain language of the Court's opinion. See, e.g., Stinson v. American Sterilyzer Co., 724 F. Supp. 868 (M.D. Ala. 1989); Crader v. Concordia College, 724 F. Supp. 558 (N.D. Ill. 1989); Johnson v. United States Elevator Corp., 723 F. Supp. 1344 (E.D. Mo. 1989); Brackshaw v. Miles, 723 F. Supp. 60 (N.D. Ill. 1989); Rivera v. At&t Information Systems, Inc., 719 F. Supp. 962 (D.Colo. 1989); James v. Dropsie College, 1989 WL 143171 (E.D. Pa. 1989); Eklof v. Bramalea Limited, 1989 WL 129357 (E.D. Pa. 1989); Brown v. Avon Products, Inc., 1989 WL 122334 (N.D. Ill. 1989); Gonzalez v. National Railroad Passenger Corp., 1989 WL 108271 (E.D. Pa. 1989); Jones v. Alltech Associates, Inc., 1989 WL 105234 (N.D. Ill. 1989); Fritchley v. Missouri Pacific Railroad Co., 1989 WL 100178 (S.D. Ill. 1989); Carroll v. General Motors Corp., 1989 WL 103645 (D. Kan.

1989); Copperidge V. Terminal Freight Handling, 50 FEP Cases 812 (W.D. Tenn. 1989).

Despite the attempts by the plaintiff, in this case, to construe the Court's language differently, the "central and express holding of Patterson is that post-formation conduct is not actionable under section 1981." Leong v. Hilton Hotels, Corp., No. 87-0840 (D.Haw. 1989).

Still, the court holdings in Patterson occurred after the events in question. Plaintiff argues that his rights ought not to be affected by subsequent changes in the law, such as were wrought by Patterson. Thus, in this instance, the remaining question is whether to apply the Patterson holdings retroactively to the plaintiff's claim or discriminatory discharge.

Retroactive application of judicial decisions is the general rule, not the exception to the rule. See Goodman v. Lukens Steel, 482 U.S. 656 (1987). However, the Supreme Court established three criteria for limiting a decision to prospective application: (1) the holding must establish a new principle of law, either by overruling clear past precedent on which litigants have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2)

the merits and demerits in each case must be weighed by looking to the history of the rule in dispute, its purpose and effect, and whether retrospective operation will further or retard the rule's operation; (3) retrospective application must create the risk of producing substantially inequitable results. Chevron Oil Co. v. Huson, 404 U.S. 97 (1971).

The Fourth Circuit had allowed discharge claims, such as in this case, to be brought under section 1981 and continued to do so with its initial Patterson ruling. See Patterson, 805 F.2d at 1145. The plaintiff argues that this right remains intact after the Supreme Court ruling since the Court never expressly stated that discharge claims could not be brought under section 1981. However, that argument focuses on what the Court failed to say, rather than what the Court actually said.

To allow the discharge claim to continue in the face of the language of the Supreme Court's opinion and the holdings of the vast majority of other courts would serve to confuse the law. The plaintiff has failed to demonstrate sufficient inequity to himself that would result if Patterson is applied retroactively

other than the overturning of precedent.[4] See Brackshaw v. Miles, supra (Patterson applied retroactively where plaintiff's evidence of inequity consisted solely of the overturning of precedent). Therefore, after considering the Chevron Oil Co. factors, the undersigned concludes that Patterson should be applied retroactively to the case at bar thereby eliminating the plaintiff's claims based on retaliatory and constructive discharge.

CONCLUSION

Accordingly, IT IS HEREBY

RECOMMENDED that defendant's Motion to Dismiss be GRANTED on all claims.

This the 26th day of February, 1990.

/s/ Alexander B. Denson

Alexander B. Denson

UNITED STATES MAGISTRATE

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4 The Plaintiff offers as evidence of inequity the fact that the statute of limitations has run on any Title VII action he might have. Retroactive application of Patterson effectively eliminates any discrimination claim he may have against the defendant.

This suggestion of inequity, though correct factually, is not persuasive. The court cannot select a remedy for the plaintiff; rather, it must insure that the remedy selected is appropriate and available under the law to the plaintiff.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NORTH CAROLINA

RALEIGH DIVISION

No. 89-442-CIV-5

DeVAUGHN E. WILLIAMS,)
)
Plaintiff,)
)
v.) ORDER
)
FIRST UNION NATIONAL BANK OF)
NORTH CAROLINA,)
)
Defendant.)

On 26 February 1990 Magistrate Alexander B. Denson filed his memorandum and recommendation with regard to the motion by defendant to dismiss pursuant to the provisions of Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Plaintiff has filed objections to the recommendation, defendant has responded, and the matter is ripe for ruling.

A de novo consideration of those matters objected to by plaintiff convinces the court that the recommendation of Magistrate Denson is correct. Accordingly, the court adopts the recommendations as its own; and, for the reasons set forth in his memorandum, the motion by defendant to dismiss is allowed and this action is hereby dismissed.

This 29 March, 1990.

/s/W. Earl Britt

W. EARL BRITT

United States District Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NORTH CAROLINA

DeVAUGHN E. WILLIAMS,

Plaintiff, JUDGMENT IN A CIVIL CASE

v.

FIRST UNION NATIONAL BANK OF NORTH CAROLINA, CASE No: 89-442-CIV-5-BR

Defendant. Raleigh Division

____ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff DeVaughn E. Williams have and recover nothing of defendant First Union National Bank of North Carolina, and this action is dismissed (BRITT, J).

THIS JUDGMENT FILED AND ENTERED ON MARCH 29, 1990, AND COPIES MAILED TO:

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March 29, 1990 /s/ J. RICH LEONARD

Date Clerk

/s/Jane Skinner

(By) Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED January 8, 1991

No. 90-2074

DEVAUGHN E. WILLIAMS

Plaintiff-Appellant

v.

FIRST UNION NATIONAL BANK OF N.C.

Defendant-Appellee

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Chapman with the concurrence of Judge Widener and Judge Haden.

For the Court,

/s/John M. Graecen

John M. Greacen, Clerk

42 U.S.C. Section 1981 provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and no other.

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-2(a)(1), provides:

(a) It shall be an unlawful employment practice for an employer --

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or

privileges of employment, because of such individual's race, color, religion, sex, or national origin;

Section 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C Section 2000e-3(a), provides:

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on the job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.